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No. 75-1892

In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, PETITIONER

v.

JEFFREY R. MACDONALD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
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The Solicitor General, on behalf of the United States, submits this supplemental memorandum to discuss the applicability of the Court's recent decisions in *Abney* v. *United States*, No. 75-6521, decided June 9, 1977, and *United States* v. *Lovasco*, No. 75-1844, decided June 9, 1977, to this case.

1. In *Abney* v. *United States, supra,* the Court held that a pre-trial order denying a defendant's motion to dismiss an indictment on double jeopardy grounds was a "final decision" within the meaning of 28 U.S.C. 1291 and, hence, was immediately appealable. The Court's decision stressed the unique nature of a double jeopardy claim, noting that the validity of such a claim is independent of the merits of the charge against the defendant and that the Double Jeopardy Clause is designed to "protect[ ] an individual against more than being subjected

to double punishments. It is a guarantee against being twice put to *trial* for the same offense" (slip op. 9). The Court observed (*id.* at 10):

> Obviously, these aspects of the guarantee's protections would be lost if the accused were forced to 'run the gauntlet' a second time before an appeal could be taken; even if the accused is acquitted, or, if convicted, the conviction ultimately reversed on double jeopardy grounds, he has still been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit. Consequently, if a criminal defendant is to avoid *exposure* to double jeopardy and thereby enjoy the full protection of the clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs.

Although the Court in *Abney* therefore recognized an exception to "the normal rule of finality" (slip op. 11) before an appeal in a criminal case could be taken, it carefully limited the scope of the exception. Interlocutory appeals are not permissible to challenge orders, such as the denial of a motion to dismiss an indictment for failure to state an offense, that "may be reviewed effectively, and, if necessary, corrected if and when a final judgment results" (slip op. 12). Moreover, *Abney* holds that the courts of appeals are without "pendent jurisdiction" to review issues that are not collateral—that is, issues not permeated by "special considerations" justifying an interlocutory appeal may not receive appellate consideration prior to trial even if they are joined to a double jeopardy claim. *Id.* at 11.

2. In light of the Court's holding in *Abney*, the court of appeals erred in assuming jurisdiction over respondent's appeal from the pre-trial order denying his motion

to dismiss the indictment on speedy trial grounds.[1] The protections afforded by the Speedy Trial Clause would not be "lost, probably irreparably" (*Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546) unless the validity of the claim were determined before trial. Unlike the Double Jeopardy Clause, the interest implicated by the Speedy Trial Clause is not the avoidance of the trial itself, but rather the avoidance of unnecessary and unjustifiable delays between accusation and trial. Moreover, unlike the double jeopardy ban, the speedy trial command of the Sixth Amendment is not exclusively a personal right of the defendant, but is also designed in important part to serve societal interests that exist "separate from, and at times in opposition to, the interests of the accused." *Barker* v. *Wingo*, 407 U.S. 514, 519.

The policies that underlie allowance of an immediate appeal in the case of double jeopardy claims, where a post-trial appeal cannot fully vindicate the interests involved, thus have no application to speedy trial contentions. Indeed, interlocutory appeals of speedy trial claims would undermine the very goals that the constitutional provision is designed to achieve, because the appeal will in most instances simply add to the length of the pre-trial delay.[2]

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[1]The opinion below is somewhat ambiguous as to whether the court of appeals viewed respondent's speedy trial claim as "pendent to [his] double jeopardy claim" (Pet. App. 5a) or as independently appealable. See also Br. in Opp. 33-34 ("[t]he court of appeals allowed Dr. MacDonald to pursue an interlocutory appeal on speedy trial grounds only after it had first determined that the claim was inextricably tied to his double jeopardy claim"). We believe that it is clear from *Abney* that neither rationale sustains the assertion of jurisdiction.

[2]Moreover, while double jeopardy claims raise issues wholly distinct from those to be considered at the trial, speedy trial claims require consideration of, among other factors, the prejudice that the

3. Since the decision in *Abney* clearly indicates that the court below lacked jurisdiction to consider respondent's appeal from the district court's order denying his motion to dismiss the indictment for denial of a speedy trial,[3] we believe that the judgment of the court of appeals should be

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delay has caused to the ability to mount a defense. The extent and significance of such prejudice rarely can be determined in the absence of a trial. See *Barker* v. *Wingo*, *supra*, 407 U.S. at 532. Thus, pre-trial appellate review of speedy trial claims will in many cases necessarily be premature.

A related recognition of this distinction between double jeopardy and speedy trial claims exists in the different treatment accorded the contention that such claims are waived by pleas of guilty. While such a plea does not preclude subsequent assertion on appeal of a double jeopardy claim (*Menna* v. *New York*, 423 U.S. 61), it has been consistently held that a plea of guilty waives defects such as pre-indictment delay and the denial of a speedy trial. See, *e.g.*, *United States* v. *O'Donnell*, 539 F. 2d 1233, 1236-1237 (C.A. 9), certiorari denied, No. 76-234, November 16, 1976; *Speed* v. *United States*, 518 F. 2d 75, 77 (C.A. 8), certiorari denied *sub nom. Camp* v. *United States*, 423 U.S. 988; *Karcher* v. *Wainwright*, 476 F. 2d 179, 180 (C.A. 5); *United States* v. *Mann*, 451 F. 2d 346, 347 (C.A. 2).

[3]Although the court of appeals analyzed the delay between 1970, when the crimes in this case were committed and the military proceedings involving respondent were held, and January 1975, when respondent was indicted, in terms of Sixth Amendment principles, we have argued in the petition that the proper inquiry is one of due process under the Fifth Amendment. Pet. 17-25. The Court's decision in *United States* v. *Lovasco*, *supra*, strongly suggests that the pre-indictment delay here did not violate the Due Process Clause. In assessing the reason for the hiatus prior to respondent's indictment, the court of appeals conceded that the case was complex (Pet. App. 21a) and that the government had not been motivated by bad faith or by a desire to hamper the defense (*id.* at 20a). The court concluded only that the delay, though largely unexplained, was due either to "indifference, negligence, or ineptitude" and that it therefore "must be weighed against the government" (*id.* at 23a). *Lovasco* establishes, however, that compelling respondent to stand trial under such circumstances would not be fundamentally unfair (slip op. 7).

reversed and remanded with instructions to dismiss that portion of respondent's appeal[4]—a course that will prevent further delay in an important first degree murder prosecution that already has been awaiting trial for more than two years. Alternatively, the Court may conclude that it is more appropriate to vacate the judgment of the court of appeals and to remand for consideration in light of the intervening decisions in *Abney* and *Lovasco*.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JUNE 1977.

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[4]In view of its decision on the Sixth Amendment question, the court of appeals found it unnecessary to render an opinion on respondent's double jeopardy claim (Pet. App. 28a). Since *Abney* holds that the double jeopardy claim alone was appealable prior to trial, the court of appeals should address that issue on remand.

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